Filed 7/7/16 P. v. Guiher CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CLYDE ADAIR GUIHER,

Defendant and Appellant.

F071469

(Super. Ct. No. MF011436A)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Kern County. Cory Woodward, Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Levy, Acting P.J., Detjen, J. and Peña, J.

INTRODUCTION

Defendant Clyde Adair Guiher is currently serving a split sentence of four years pursuant to Penal Code[1] section 1170, subdivision (h)(5)(B), with two years to be served in county jail followed by two years on mandatory supervision. He contends one of two prior prison terms used to enhance his sentence must be vacated because the underlying felony conviction has subsequently been reduced to a misdemeanor under Proposition 47. He also asks this court to instruct the lower court to conduct a hearing on the other prior conviction to determine whether the prior prison term enhancement resulting from that conviction must also be vacated. We conclude defendant is not entitled to the relief he seeks and affirm the order.

FACTS AND PROCEDURAL HISTORY

Defendant's Current Offenses

On October 24, 2014, defendant pled no contest to possession of methamphetamine for purpose of sale (Health & Saf. Code, § 11378), and he admitted he had previously served two prior prison terms pursuant to section 667.5, subdivision (b). One prior prison term was based on a 2013 conviction for the unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a)), the other was for a 2010 conviction for the possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)).

On November 4, 2014, California voters approved Proposition 47 (Official Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, pp. 70-74 (Voter Guide)) and it became effective the next day (Cal. Const., art. II, § 10, subd. (a)).

On November 20, 2014, defendant was sentenced in his October 24th case. He received a four-year split sentence under section 1170, subdivision (h)(5)(B), consisting of two years to be served in county jail, and two years to be served on mandatory supervision.

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[1] All further undefined statutory citations are to the Penal Code unless otherwise indicated.

Sometime before December 23, 2014, defendant filed a petition to reduce his 2010 conviction for the possession of methamphetamine (Health & Saf. Code, § 11377) to a misdemeanor under Proposition 47. The petition was granted.

On March 24, 2015, defendant filed a motion to reduce the term of his mandatory supervision pursuant to section 1203.3 by one year. Under section 1203.3, the superior court has authority to revoke, modify, or terminate a person's probation at any time during the defendant's term of probation. Defendant argued the trial court should have reduced his term of mandatory supervision because one of the felony priors used to enhance his sentence, his 2010 conviction for possession of methamphetamine, had been reduced to a misdemeanor under Proposition 47 and is now considered a misdemeanor "for all purposes."

On April 17, 2015, after argument on the matter, the trial court denied defendant's motion. The court held that prior prison term enhancements under section 667.5, subdivision (b) stand regardless of whether Proposition 47 reclassifies an underlying felony conviction as a misdemeanor.

Proposition 47

Proposition 47 renders certain drug- and theft-related offenses as misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or "wobblers," meaning they could be charged as a felony or a misdemeanor offense. Proposition 47 also created a new statutory provision whereby a person serving a felony sentence for a reclassified offense can petition for a recall of his or her sentence. (§ 1170.18, subd. (a).)

Relevant here are two changes caused by the initiative. First, Proposition 47 reduced the offense of possession of a controlled substance in violation of Health and Safety Code section 11377, formerly a wobbler offense, to a misdemeanor.

Second, Proposition 47 added section 490.2 to the Penal Code, which provides the following:

> "(a) Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor …."

Based on these changes, defendant challenges two prior felony convictions used to enhance his current sentence.

ANALYSIS

Defendant's current sentence was enhanced by two prior prison terms pursuant to section 667.5, subdivision (b). He asserts this court must: (1) remand this matter back to the trial court with instructions to vacate the prior prison term enhancement based on his 2010 drug possession conviction; and, (2) instruct the lower court to hold a hearing on the facts underlying his 2013 conviction for the unlawful taking or driving of a vehicle to determine whether the enhancement based on this offense must also be vacated. We conclude defendant is not entitled to relief for several reasons.

1. Defendant Has Failed to File a Petition Under Proposition 47

The first flaw of defendant's argument is that the remedy he seeks is outside the scope of section 1170.18, subdivision (f), which instructs eligible persons on how to apply for relief under Proposition 47 for a sentence already served. As this court explained in *People v. Bradshaw* (2016) 246 Cal.App.4th 1251, 1257 (*Bradshaw*), persons seeking to avail themselves of the benefits of Proposition 47 must first file a petition in the superior court. Although defendant filed a petition for his 2010 drug possession conviction, it does not appear he filed a petition for his 2013 conviction for the unlawful taking or driving of a vehicle.

For defendants who are currently serving a sentence for a felony reduced by Proposition 47, as well as for those who have completed a sentence for such an offense, "the remedy lies in the first instance by filing a petition to recall (if currently serving the sentence) or an application to redesignate [or reclassify] (if the sentence is completed) in the superior court of conviction." (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1331-

1332; see *People v. Scarbrough* (2015) 240 Cal.App.4th 916, 925, 929-930 [defendant seeking resentencing under Prop. 47 must file petition for recall of sentence in trial court once underlying judgment is final]; see also *People v. Shabazz* (2015) 237 Cal.App.4th 303, 313-314 [defendant limited to statutory remedy set forth in § 1170.18, which requires a defendant who has completed felony sentence to file an application in the superior court for reclassification].)

Defendant contends he was excused from bringing a petition in the superior court because "Proposition 47 was already in effect before judgment was imposed in [the instant] case, and use of that prior conviction for purposes of [a] felony-based enhancement was not authorized." We reject his assertion. There is no automatic resentencing under Proposition 47, and it is "is not automatically applicable to those whose judgments are not yet final." (*Bradshaw*, 246 Cal.App.4th at p. 1257.) "If a defendant has completed his or her sentence, he or she must file an application before the trial court to have the conviction designated a misdemeanor." (*Id.* at p. 1258.) Further, even if defendant were permitted to circumvent the petition procedures set forth under section 1170.18, subdivision (f), as we explain below, he is not entitled to the relief he seeks as a matter of law.

2. Proposition 47 Does Not Apply to Vehicle Code Section 10851

With respect to defendant's prior conviction for the unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a)), this offense is not subject to reclassification as a misdemeanor under Proposition 47. While Proposition 47 allows a defendant convicted of one of several theft-related felonies to petition to have that conviction treated as a misdemeanor, including grand theft, the defendant must show the value of the property involved did not exceed $950. (§§ 490.2, subd. (a), 1170.18.)

Defendant did not meet his burden in this case. In fact, he does not allege the property underlying his prior felony conviction was actually worth $950 or less, nor does he allege any facts supporting such a claim. Defendant's section 1203.3 motion failed to

provide any information whatsoever about the nature of the conduct underlying his conviction and the value of the stolen property to enable the superior court to determine whether he was eligible for resentencing. He asks this court to remand the matter back to the lower court for a hearing on these issues. We decline to do so.

Even assuming the vehicle's value did not exceed $950, a felony conviction under Vehicle Code section 10851 is not subject to reclassification as a misdemeanor under Proposition 47.[2] The plain language of section 1170.18 fails to identify Vehicle Code section 10851 as one of the code sections amended or added by the initiative.[3] Because there appears to be no legislative intent to the contrary, we infer the failure to specify Vehicle Code section 10851 as an offense amended by Proposition 47 was a deliberate choice by our Legislature to exclude the offense. (*Strang v. Cabrol* (1984) 37 Cal.3d 720, 725 [under the maxim of *expressio unius est exclusio alterius*, "an express exclusion from the operation of a statute indicates the Legislature intended no other exceptions are to be implied").]

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[2]Whether Penal Code section 1170.18 applies to Vehicle Code section 10851 convictions is presently before our Supreme Court in *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted and holding for lead case, March 16, 2016, S232344; *People v. Haywood* (2016) 243 Cal.App.4th 515, review granted and holding for lead case, March 9, 2016, S232250; and *People v. Page* (2016) 241 Cal.App.4th 714, review granted January 27, 2016, S230793. Several recent cases are in accord with our determination that defendant is not entitled to relief under Proposition 47. (*People v. Johnston* (2016) 247 Cal.App.4th 252, 255; *People v. Solis* (2016) 245 Cal.App.4th 1099, review granted, June 8, 2016, S234150.)

[3]The initiative enacting section 1170.18 reduced three specific drug possession offenses to misdemeanors (Health & Saf. Code, §§ 11350, 11357, 11377), as well as forging or writing bad checks (§§ 473, 476a), receiving stolen property (§ 496), and petty theft. In so doing, section 490.2 was added, which now defines "petty theft" as involving "money, labor, real or personal property" with a value less than $950: "[n]otwithstanding Section 487" (which had specifically defined "[g]rand theft" on the basis of value or type of property) "or any other provision of law defining grand theft" (§ 490.2, subd. (a)). The initiative additionally amended section 666 (also called "petty theft with a prior") to allow wobbler punishment for recidivists who are otherwise disqualified from the initiative. Finally, it added the new misdemeanor of "shoplifting" (§ 459.5). (See Voter Guide, *supra*, Official Title and Summary of Prop. 47, p. 34; see also *id.*, text of Prop. 47, §§ 5-13, pp. 71–73.) As can be seen, Vehicle Code section 10851, subdivision (a) is not one of the enumerated offenses expressly amended by Proposition 47.

Defendant asserts that even though Vehicle Code section 10851 is not expressly listed within the enumerated sections added or amended by Proposition 47 (see § 1170.18, subd. (a)), section 490.2 supports his conclusion the offense is, nonetheless, reducible to a misdemeanor under Proposition 47. As noted, Proposition 47 added section 490.2 to the Penal Code, which provides the following:

> "(a) Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor …."

Defendant contends the term "notwithstanding" in section 490.2 means the theft of *any property* valued at less than $950 qualifies for relief under Proposition 47. In other words, it appears defendant asserts section 490.2 must be interpreted broadly to include all low-level thefts (thefts under $950), including Vehicle Code section 10851.

We reject his interpretation. Vehicle Code section 10851, subdivision (a) provides:

> "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty …."

The plain language of the statute makes clear it can be violated by either taking a vehicle with the intent to steal it, or by driving it with the intent only to *temporarily* deprive the owner of possession. (*People v. Garza* (2005) 35 Cal.4th 866, 876 ["A person can violate [Vehicle Code] section 10851(a) 'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).'"].) Thus, depending on the circumstances in which the offense occurred, a violation of Vehicle Code section 10851 may not be a theft offense.

Theft requires the specific intent to permanently deprive the owner of possession. (*In re Jesus O.* (2007) 40 Cal.4th 859, 867.)

Moreover, other sections within Proposition 47 indicate a Vehicle Code section 10851 conviction cannot be treated as a crime of either petty or grand theft. For example, Proposition 47 amended section 666, petty theft with a prior. (§§ 666, 1170.18, subd. (a) [listing § 666 as among the sections amended or added by Proposition 47].) Eligible prior convictions include "petty theft, grand theft, … auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery," and receiving stolen property. (§ 666, subd. (a).) The inclusion of "auto theft under Section 10851 of the Vehicle Code," in the list of prior convictions is separate from "petty theft" and "grand theft." This language indicates Proposition 47 treats Vehicle Code section 10851 convictions as separate from either grand theft or petty theft convictions.

Defendant also argues the purpose of Proposition 47 supports the conclusion Vehicle Code section 10851 qualifies for relief under it. As evidenced by ballot materials, Proposition 47 was enacted to address California's overcrowded prisons, to focus spending on violent and serious crimes, and to provide funding for education and prevention programs. (Voter Guide, *supra*, argument in favor of Prop. 47, p. 38.)

Defendant asserts section 490.2, which defines petty theft, must necessarily be interpreted liberally to accomplish these objectives. However, because the plain language of section 490.2 is clear and unambiguous, we will not depart from the text of the statute in favor of the general intent behind the initiative. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 301 ["'Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.'"].)

Defendant additionally contends Vehicle Code section 10851, subdivision (a) is a lesser included offense of grand theft auto (§ 487, subd. (d)(1)), and since Proposition 47

applies to grand theft auto, a person convicted of the lesser included offense must also be entitled to similar relief. Although Vehicle Code section 10851, subdivision (a) may be a lesser included offense of grand theft auto (§ 487; *People v. Buss* (1980) 102 Cal.App.3d 781, 784), there is no language within Proposition 47 from which we may conclude the initiative was intended to apply not only to reduce the punishment for all specified offenses, but also apply to lesser included offenses. A lesser included offense is not necessarily less serious than a greater offense. Indeed, a lesser included offense may even be punished more seriously than the greater offense. (See *People v. Wilkinson* (2004) 33 Cal.4th 821, 839 [not irrational to punish lesser included offense more severely than greater offense].) Thus, we conclude defendant's prior conviction for the unlawful taking or driving of a vehicle is not subject to Proposition 47 relief.

3. Proposition 47 Does Not Alter Defendant's Prior Prison Term Enhancements

The final flaw in defendant's argument is that he presumes Proposition 47 operates retroactively to alter a prior prison term enhancement. We conclude that where a defendant's sentence is enhanced for a prior felony conviction *before* the prior conviction is reduced to a misdemeanor under Proposition 47, the defendant is not entitled to relief.[4]

Defendant contends *People v. Flores* (1979) 92 Cal.App.3d 461 (*Flores*) compels a different result. Flores was convicted in 1966 for possession of marijuana, for which he served a prison term. (*Id.* at p. 470.) In 1977, he was convicted of selling heroin. (*Id*. at pp. 464-466.) His sentence for selling heroin was enhanced by one year under section 667.5 based on his 1966 conviction. (*Id*. at p. 470.)

Flores sought to overturn his 1966 conviction on the basis of subsequent legislation reducing the penalty for marijuana possession and mandating the destruction

[4]Our Supreme Court has granted review to resolve the issue. (*People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201; *People v. Williams* (2016) 245 Cal.App.4th 458, 466, review granted May 11, 2016, S233539.)

of records of arrests and convictions pertaining to marijuana possession crimes. (*Flores*, *supra*, 92 Cal.App.3d at pp. 471-472.) The appellate court held Flores was entitled to the relief he sought because the Legislature's destruction-of-records-mandate evidenced a clear intent to prevent those records from being used to enhance future sentences. (*Id*. at pp. 472-473.)

Unlike the mandate in *Flores*, neither Proposition 47 nor the ballot materials evidence a clear intent by the voters that Proposition 47 should apply retroactively to alter sentence enhancements. Nonetheless, defendant advances several arguments in support of his assertion that Proposition 47 has a retroactive effect.

First, citing to general objectives behind Proposition 47, defendant contends proponents of the initiative wanted its reach to be as extensive as possible. Ballot materials suggest the passage of Proposition 47 would ensure prisons would house only violent and serious offenders, rather than those who commit low-level crimes, such as drug possession and petty theft. (Voter Guide, *supra*, argument in favor of Prop. 47, p. 38.)

While neither Proposition 47 nor the ballot materials address section 667.5 or recidivist enhancements generally, ballot materials also indicate voters were assured that if the initiative was passed, dangerous criminals would remain locked up, and there would be no automatic release of criminals. (Voter Guide, *supra*, text of Prop. 47, § 3, subds. (4), (5), p. 70); *id*., rebuttal to argument against Prop. 47, p. 39.) Section 667.5 is a recidivist enhancement, intended to punish hardened criminals who are undeterred by the fear of prison. (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115.) Because a person who refuses to reform even after serving time in prison is clearly more dangerous than someone who merely possesses drugs for personal use or shoplifts, we are not persuaded the voters intended Proposition 47 to alter prior prison term enhancements.

Second, defendant argues Proposition 47 "clearly envisioned retroactive relief for those who qualified." He cites to subdivision (f) of section 1170.18, which permits an

individual currently serving a sentence for a Proposition 47 reducible felony to petition the superior court for recall of his or her sentence. (§ 1170.18, subd. (f).) However, nothing within the plain language of the statute indicates a prior prison term enhancement may be stricken, vacated, or otherwise modified as a result of a felony conviction so reduced by Proposition 47.

Finally, defendant argues that reduction of a qualifying felony to a misdemeanor is automatic under Proposition 47, and because the prior offense is considered a misdemeanor "for all purposes," a prior prison term enhancement must be eliminated because there is no longer a felony underlying the enhancement. Defendant cites to *People v. Park* (2013) 56 Cal.4th 782 (*Park*), which held "when a wobbler has been reduced to a misdemeanor the prior conviction does not constitute a prior felony conviction within the meaning of section 667[, subdivision](a)." (*Id.* at p. 799.)

Defendant's reliance on *Park* is misplaced. In *Park*, the trial court reduced the defendant's prior felony conviction to a misdemeanor, and then dismissed the conviction. (*Park, supra*, 56 Cal.4th at p. 787.) The defendant's prior conviction was reduced to a misdemeanor under section 17, subdivision (b)(3), which provides, "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail …, it is a misdemeanor for all purposes … [¶] … [¶] [w]hen the court grants probation to a defendant without imposition of sentence and at the time of granting probation … declares the offense to be a misdemeanor."

Our Supreme Court held the conviction no longer qualified as a prior serious felony within the meaning of section 667, subdivision (a) and could not be used to enhance the defendant's sentence for crimes he subsequently committed. (*Park, supra*, 56 Cal.4th at p. 787.) Critically, however, the trial court's reduction and dismissal of the prior felony conviction occurred *before* the defendant was sentenced for any new crimes.

Here, assuming defendant files a petition for reclassification of his prior felonies, the reduction will have occurred after he has already committed, been convicted, and

begun serving a sentence for his current crimes. His sentence has already been enhanced based on his prior offenses. The *Park* court considered this scenario and stated, "There is no dispute that … defendant would be subject to the section 667[, subdivision](a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor." (*Park*, *supra*, 56 Cal.4th at p. 802.) Thus, *Park* actually supports this court's holding that Proposition 47 does not have a retroactive application.

Defendant also argues Proposition 47 was intended to retroactively alter prior prison term enhancements because the "for all purposes" language in section 1170.18, subdivision (k) must be interpreted identically to language found in section 17, subdivision (b). Section 1170.18, subdivision (k) provides the following, in pertinent part: "Any felony conviction that is … designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes …." The phrase "for all purposes" is identical to language in section 17, subdivision (b).

The commission of a wobbler is a felony at the time the offense is committed, and remains a felony until the crime is characterized as a misdemeanor, or the perpetrator is convicted and sentenced to something less than incarceration in state prison. (*People v. Moomey* (2011) 194 Cal.App.4th 850, 857.) Under section 17, subdivision (b), when the court exercises its discretion to sentence a wobbler as a misdemeanor, "it is [then considered] a misdemeanor for all purposes." However, the "misdemean[or] status [is] not … given retroactive effect." (*Moomey*, at p. 857.) So, while an offense may be a misdemeanor "for all purposes," it is not a misdemeanor *for all times*. The trial court's declaration that a wobbler is a misdemeanor simply makes the offense a misdemeanor from that point on.

We presume the voters "'intended the same construction' for the language in section 1170.18, subdivision (k), 'unless a contrary intent clearly appears.'" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1100.) As discussed, however, nothing in the plain

language of section 1170.18 or the ballot materials reflects a contrary intent. (*Rivera*, at p. 1100.)

We conclude that based on the language of section 1170.18 and the voter's intent in passing the initiative, Proposition 47 does not apply retroactively to alter sentence enhancements. As a result, we reject defendant's claim that he is entitled to have his prior prison term enhancements vacated.

DISPOSITION

The order is affirmed.